Dato' Yeoh Kian Hin v Wijaya Astana Sdn Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–122 OF 2000
SU GEOK YIAM JC
21 SEPTEMBER 2001

Civil Procedure *— Specific performance — Application for — Guarantee by defendant to purchase shares in the event that third party failed to do so — Whether guarantee was an agreement for the 'purchase of any property, with an alternative claim for damages' — Whether necessary for prayer for specific performance to be set out in the body of the summons — Rules of the High Court 1980 O 81*

Contract *— Specific performance — Failure of defendant to complete sale — Guarantee by defendant to purchase shares in the event that third party failed to do so — Whether guarantee was an agreement for the 'purchase of any property, with an alternative claim for damages' — Whether shares were freely available in the market or were quoted on stock exchange*

This was the plaintiff's application, vide summons-in-chambers (encl 6), for summary judgment for specific performance under O 81 of the Rules of the High Court 1980 ('the RHC') of a contract of guarantee against the first defendant ('D1'). Pursuant to the guarantee, D1 agreed to buy 15,269,000 ordinary shares in a foreign company ('the said shares') at the price of RM3.6m should MC Sdn Bhd fail to buy back the said shares from the plaintiff pursuant to a supplemental agreement entered between the plaintiff and MC Sdn Bhd. Under cl 5 of the guarantee, D1 agreed to be liable to the plaintiff as a principal debtor for all moneys due and owing by MC Sdn Bhd. MC Sdn Bhd failed to buy back the said shares and the plaintiff served a notice of demand on D1. The plaintiff had annexed to his supporting affidavit, the draft supporting minutes of the judgment sought from the court.

Held, allowing the plaintiff's application:

(1) Although the contract of guarantee was not an agreement for the grant or assignment of a lease of any property, nevertheless, it was an agreement for the 'purchase ... of any property, with an alternative claim for damages', as provided under O 81 of the RHC. This was because under cl 8 of the guarantee, D1 had stepped into the shoes of MC Sdn Bhd as the principal debtor and having done so, D1 was contractually bound to purchase the said shares from the plaintiff at the buy back price of RM3.6m. In addition, D1 was liable, under cl 1.1 of the guarantee, to purchase the said shares from the plaintiff at RM3.6m (see p 694D–E, H).

(2) Order 81 r 2 of the RHC requires the application to be made by summons supported by an affidavit made by some person who can swear positively to the facts verifying the cause of action and stating that in his belief, D1 had no defence to his action. In the instant

case, the plaintiff had sworn the supporting affidavit verifying his cause of action and had stated that in his belief, D1 had no defence to his action. In addition, the plaintiff had also complied with O 81 rr 2(2), 2(3) and 2A of the RHC (see p 695E–I). A

(3) In view of the plaintiff's summons-in-chambers in encl 6, the plaintiff's supporting affidavit, the supplementary agreement and the contract of guarantee, the court was satisfied that the plaintiff had complied fully with the requirements of O 81 rr 1 and 2 of the RHC. In addition, the plaintiff had succeeded in establishing a prima facie claim for summary judgment for specific performance of the contract of guarantee (see p 696D–E). B

(4) D1 had failed to show that there was any issue or question in dispute to be tried or that there ought to be a trial of the action. D1's affidavit-in-reply comprised bare denials (see pp 696I–697A). C

(5) The decree of specific performance was spelt out in the proposed minutes of the judgment. As such, it was not necessary for the prayer for specific performance to be set out in the body of the summons under O 81 of the RHC (see p 700D–E). D

(6) Clause 2 of the contract of guarantee conferred on the plaintiff the option to sell or dispose of the said shares in the event that D1 defaulted in buying back the said shares. Notwithstanding cl 2, it was the practice of the court to grant specific performance of contracts for the sale of the shares unless the shares were freely available in the market. Here, D1 had not shown that the said shares were freely available in the market or that they were quoted on the international stock exchange (see p 701B–F). E

(7) Pursuant to cl 19 of the guarantee, the demand issued by the plaintiff was deemed received by D1 48 hours after the same had been posted, notwithstanding that the demand may have been returned undelivered. Therefore, it was not essential for the plaintiff to show proof of receipt of the notice of demand by D1 (see p 701H–I). F

G

[Bahasa Malaysia summary

Ini dalah permohonan plaintif, melalui saman dalam kamar (lamp 6), bagi penghakiman terus bagi pelaksanaan spesifik di bawah A 81 Kaedah Mahkamah Tinggi 1980 ('KMT') satu kontrak ikat jamin ke atas defendan pertama ('D1'). Menurut ikat jamin tersebut, D1 telah bersetuju untuk membeli 15,269,000 saham biasa dalam sebuah syarikat asing ('saham tersebut') pada harga RM3.6j sekiranya MC Sdn Bhd gagal membeli balik saham tersebut daripada plaintif seperti diasaskan satu perjanjian tambahan diantara plaintif dan MC Sdn Bhd Di bawah kl 5 ikat jamin tersebut, D1 bersetuju bertanggungjawab kepada plaintif sebagai penghutang utama bagi kesemua bayaran yang terhutang oleh MC Sdn Bhd. MC Sdn Bhd H I

A gagal membeli balik saham tersebut dan plaintif telah menyampaikan notis tuntutan ke atas D1. Plaintif telah melampirkan kepada afidavit sokongannya deraf minit penghakiman yang dipohonnya dari mahkamah.

B **Diputuskan**, membenarkan permohonan plaintif:

(1) Walaupun kontrak ikat jamin tersebut bukannya satu persetujuan bagi pemberian atau penyerahan penyewaan mana-mana hartanah, walau bagaimanapun, ianya satu persetujuan bagi 'pembelian...mana-mana hartanah, dengan tuntutan alternatif C bagi ganti rugi', sepertimana diperuntukan di bawah A 81 KMT. Ini adalah sebab di bawah kl 8 ikat jamin, D1 telah mengambil tempat MC Sdn Bhd sebagai penghutang utama dan setelah berbuat sedemikian D1 diwajibkan secara kontrak membeli saham tersebut daripada plaintif pada harga belian balik RM3.6j. Tambahan pula, D1 bertanggungjawab, di bawah kl 1.1 ikat D jamin tersebut membeli saham tersebut daripada plaintif diatas harga 3.6j (lihat ms 694D–E, H).

(2) Aturan 81 k 2 KMT memerlukan permohonan dibuat secara saman, disokong oleh afidavit oleh orang yang dapat berikrar kepada fakta yang menjadi asas tuntutan dan menyatakan E bahawa dalam kepercayaannya, D1 tiada pembelaan kepada tuntutannya. Dalam kes ini plaintif telah pun mengikrarkan afidavit sokongan asas tuntutannya dan telah menyatakan bahawa dalam pendapatnya, D1 tiada pembelaan ke atas tindakannya. Lagipun plaintif telah mematuhi A 81 kk 2 (2), 2(3) dan 2A KMT (lihat ms 695E–I).

F (3) Memandangkan saman dalam kamar plaintif dalam lamp 6, afidavit sokongan plaintif, persetujuan tambahan dan kontrak Ikat Jamin, mahkamah berpuas hati plaintif telah mematuhi sepenuhnya keperluan A 81 kk 1 dan 2 KMT. Lagipun plaintif berjaya mendirikan tuntutan prima facie bagi penghakiman terus bagi pelaksanaan spesifik kontrak ikat jamin tersebut G (lihat ms 696D–E).

(4) D1 gagal menunjukkan wujudnya mana-mana isu ataupun persoalan yang dipertikaikan untuk diperbicarakan ataupun harus ada satu perbicaraan tindakan tersebut. Afidavit jawapan D1 sekadar mengandungi penafian sahaja (lihat ms 696I–697A).

H (5) Memandangkan yang perintah pelaksanaan spesifik yang dipohon tertera dalam minit-minit penghakiman yang disyorkan, maka tidaklah perlu permohonan bagi pelaksanaan spesifik tertera dalam di dalam badan saman di bawah A 81 KMT (lihat ms 700D–E).

I (6) Klausa 2 kontrak ikat jamin mengurniakan ke atas plaintif pilihan menjual atau melupuskan saham tersebut sekiranya D1 gagal membeli balik saham tersebut. Walaupun dengan kl 2, adalah

menjadi lumrah mahkamah membenarkan pelaksanaan spesifik kontrak jualan saham kecuali saham tersebut dapat diperolehi di pasaran. Di sini D1 gagal menunjukkan saham tersebut dapat diperolehi dalam pasaran atau ditawarkan di bursa saham antarabangsa (lihat ms 701B–F).

(7) Berikutan kl 19 ikat jamin, tuntutan telah dikeluarkan oleh plaintif dan dianggap telah diterima oleh D1 48 jam selepas ianya diposkan, walaupun tuntutan tersebut mungkin dikembalikan tanpa dihantar. Oleh itu, tidak wajib bagi plaintif untuk menunjukkan notis tuntutan telah diterima oleh D1 (lihat ms 701H–I).]

Notes

For cases on application for specific performance, 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 5433.

For cases on the failure of the defendant to complete a purchase, 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 3822.

Cases referred to

Chen Heng Ping v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (refd)

Mohamed bin Othman & Anor v Abdul Shattar bin Abdul Rahim & Ors [1987] 2 MLJ 695 (refd)

Ng Ah Ba & Ors v Ramanda Sdn Bhd [1996] 1 MLJ 62 (refd)

Robslaw Bros Ltd v Mayer [1957] Ch 125 (refd)

Sova Sdn Bhd [1988] 2 MLJ 268 (refd)

Woodlands v Hind [1955] 2 All ER 604 (refd)

Young v Markworth Properties Ltd [1965] Ch 475 (refd)

Legislation referred to

Rules of the High Court 1980 O 81

A Iruthaya Raj (*Raj Selva & Co*) for the plaintiff.

Ayleswary (*Kula & Assoc*) for the first and second defendant.

Noorehan bt Zakaria (*SK Chan* with her) (*Vincent Hooi & Chan*) for the third defendant.

Su Geok Yiam JC: This is an application by the plaintiff vide summons-in-chambers (encl 6) for summary judgment for specific performance of a contract of guarantee against the first defendant for the buy-back by the first defendant of 15,569,000 Pacific Matrix shares and for the payment by the first defendant of a sum of RM3,658,555.04 representing the buy-back price of the 15,569,000 Pacific Matrix shares under O 81 of the Rules of the High Court 1980 ('the RHC').

Facts and background

The plaintiff is a businessman. The first defendant is a private limited company incorporated in Malaysia and having its registered address at No 44A, Jalan Che Wan, 30250 Ipoh, Perak.

The plaintiff has averred in his affidavit affirmed on 11 July 2000 (encl 7) in support of his application that the first defendant is and was at the commencement of this action justly and truly indebted to the plaintiff in the sum of RM3,658,585.04.

The plaintiff has endorsed his writ of action (encl 1) with the following particulars of his claim:

(1) The plaintiff's claim against the first defendant is based on a contract of guarantee entered into between the plaintiff and the first defendant on 30 November 1998, (exh 'YKH-2', encl 7) ('the said contract of guarantee').

(2) Pursuant to cl 1.1 of the said contract of guarantee the defendant has agreed to buy back 15,569,000 ordinary shares in Pacific Matrix Limited ('the Pacific Matrix shares') should the shares not be bought back by one Meridian Concord Sdn Bhd, a company incorporated in Malaysia (hereinafter referred to as 'the said purchaser') from the plaintiff pursuant to a supplementary agreement also dated 30 November 1998 (exh 'YKH-1', encl 7) ('the said supplementary agreement').

(3) By two sale and purchase agreements both dated 4 January 1997 ('the said principal agreements') the plaintiff as vendor agreed to sell to the said purchaser two pieces of lands held under HS(D) 292 Lot 208 and HS(D) 293 Lot 209 both in the Mukim of Tanah Rata, District of Cameron Highlands ('the said properties') for a consideration of RM3,895,890.

(4) The said purchaser failed to complete the purchase by paying the balance of the purchase price in accordance with the terms and conditions of the said principal agreements and the plaintiff was entitled to terminate the said principal agreements.

(5) In consideration of the plaintiff agreeing not to terminate the principal agreements and entering into the said supplementary agreement which granted an extension of time to the said purchaser to complete the purchase and varied the mode of payment of the purchase price, the first, second and third defendants entered into the said contract of guarantee on 30 November 1998 with the plaintiff.

(6) Under the said contract of guarantee, the defendants agreed and undertook to guarantee the performance by the said purchaser of the terms and conditions of the principal agreements as varied by the said supplementary agreement to be executed by the plaintiff and the said purchaser.

(7) Under cl 5 of the said contract of guarantee, the first defendant is also liable to the plaintiff as a principal debtor for all moneys due and owing by the said purchaser.

(8) As a result of the said contract of guarantee, the plaintiff entered into the said supplementary agreement with the said purchaser on the same date as the said contract of guarantee, ie 30 November 1998.

(9) Under the said supplementary agreement, the plaintiff granted an extension of time to the said purchaser to complete the purchase of the two properties and the said purchaser agreed, inter alia, to:

(a) pay the increased purchase price to the plaintiff in respect of both properties in the sum of RM4,348,173.90;

(b) pay RM300,000 to the plaintiff on 15 November 1998 as part payment of the purchase price;

(c) settle the balance of the purchase price in the sum of RM3,658,585.04 by way of transfer of 15,569,000 ordinary shares in Pacific Matrix Limited ('the Pacific Matrix shares') at AUD 0.20 per share into the name of the plaintiff or his nominee;

(d) buy back the Pacific Matrix shares at a buy back price of RM3,658,585.04 on or before 30 June 1999.

(10) Upon the registration of the transfer of the Pacific Matrix shares into the name of the plaintiff, the plaintiff in accordance with the said supplementary agreement allowed the transfer of both properties into the name of the said purchaser.

(11) The first defendant had agreed and undertook under the said contract of guarantee to:

(a) pay the plaintiff the buy back price of the Pacific Matrix shares within 14 days of a demand made by the plaintiff upon the first defendant and the plaintiff shall transfer the shares to the first defendant if the said purchaser should fail to buy back the shares from the plaintiff before or on 30 June 1999;

(b) guarantee the due performance, observance and compliance by the said purchaser of all its obligations, covenants, undertakings and liabilities under the said supplementary agreement and/or the principal agreement as modified and varied by the said supplementary agreement;

(c) guarantee payment of and to pay to the plaintiff on demand all sums of money and owing by the said purchaser to the plaintiff at any time and from time to time under the said principal agreements and or the said supplementary agreement; and

(d) indemnify the plaintiff in respect of all loss and damage suffered by the plaintiff as a result of the said purchaser's breach or failure to comply with any of the provisions of the said principal agreements and/or the said supplementary agreement.

(12) The plaintiff has suffered loss and damage as a consequence of the first defendant's breach of the said contract of guarantee.

(13) The plaintiff has prayed for the following reliefs:

(a) judgment for the sum of RM3,658,585.04 being the buy-back price of the Pacific Matrix shares;

(b) all consequential directions and orders;

(c) such further or other relief as the court may deem fit to give;

(d) interest;

(e) alternatively damages; and

(f) costs.

The said purchaser having defaulted in buying back the shares by paying the buy-back price as stated in cl 5.1 of the said supplementary agreement, the plaintiff's solicitors served a notice of demand dated 25 April 2000 on the first defendant (exh 'YKH-3', encl 7). The notice of demand required the first defendant to buy back the shares by paying the sum of RM3,658,585.04 within 14 days from the date of the notice. Upon receipt of the buy-back price the plaintiff would transfer the shares to the first defendant. The first defendant has defaulted in complying with the said notice by failing to pay to the plaintiff the buy-back price of RM3,658,585.04.

The plaintiff has also averred that:

(a) pursuant to the very wide terms of the said contract of guarantee the first defendant has agreed to guarantee and indemnify the plaintiff all the moneys owing to the plaintiff by the purchaser under the said supplementary agreement;

(b) the first defendant is also liable to the plaintiff as a principal debtor under cl 8 of the said contract of guarantee; and

(c) the first defendant has no defence to his claim.

The plaintiff has annexed to his supporting affidavit the draft minutes of the judgment sought from the court (exh 'YKH-4'). The draft minutes state as follows:

DALAM MAHKAMAH TINGGI MALAYA DI IPOH
GUAMAN SIBIL NO 22-122-2000

ANTARA

DATO YEOH KIAN HIN, PLAINTIF
No 50 Tambun Road,
31400 Ipoh, Perak

DAN

1 WIJAYA ASTANA SDN.BHD.
(No. Syarikat 343690-K)
No. 44A, Jalan Che Wan,
30250 Ipoh, Perak

2 FOO KUM CHEUN
No 5 Lebuh Dato Khong Kam Tak,
31400 Ipoh, Perak.

3 WONG TUI KIONG
No 60-B, Persiaran Camellia 3,
39000 Tanah Raja,
Cameron Highlands DEFENDANTS

MINIT MINIT PENGHAKIMAN

ADALAH DIPERINTAHKAN bahawa perjanjian membeli balik 15,569,000 saham Pacific Matrix oleh defendan pertama seperti dikandung dalam Fasal 1.1 Gerenti tersebut dengan serta merta dilaksanakan.

ADALAH JUGA DIPERINTAHKAN bahawa defendan pertama dengan serta merta membayar wang sebanyak RM3,658,585.04 sebagai harga membeli balik saham Pacific Matrix yang disetujui.

DAN JUGA DIPERINTAHKAN bahawa setelah menerima harga membeli balik plaintif melaksanakan memorandum pindahmilik yang perlu untuk saham Pacific Matrix dalam nama defendan pertama.

DAN JUGA DIPERINTAHKAN bahawa defendan pertama membayar faedah atas kadar 8.4% setahun dari 17.5.2000 hingga pembayaran.

DAN ADALAH JUGA DIPERINTAHKAN bahawa plaintif diberi kebebasan memohon kepada Mahkamah Mulia ini untuk arahan-arahan perlu atau selanjutnya berkenaan pelaksanaan perintah ini.

DAN AKHIRNYA DIPERINTAHKAN bahawa defendan pertama membayar kos dan kos 'incidental' kepada permohonan ini dan kos tindakan ini yang ditaksir dan dibayar kepada plaintif.

.....
Timbalan Pendaftar
Mahkamah Tinggi
Ipoh.

In conclusion, the plaintiff prayed for an order in terms of his application under cl 8 of the said contract of guarantee.

In its affidavit-in-reply (encl 12) affirmed on 18 October 2000 by one of its directors, Foo Kum Cheun, the first defendant has denied:

(1) any knowledge of the said supplementary agreement;

(2) that it entered into the said contract of guarantee;

(3) that the said purchaser had defaulted in buying back the said shares by paying the buy-back price as stated in cl 5.1 of the said supplementary agreement;

(4) that it has received the said notice of demand;

(5) that it had defaulted in complying with the said notice of demand by failing to pay the buy-back price of RM3,658,585.04;

A (6) that it had agreed to guarantee and indemnify the plaintiff for all the moneys owing to the plaintiff by the said purchaser under the said supplementary agreement;

(7) that it is also liable to the plaintiff as a principal debtor; and

(8) that it has no defence to the plaintiff's claim.

B Further or in the alternative, the first defendant also averred as follows:

(1) The plaintiff did not have any cause of action against the first defendant and/or the plaintiff's cause of action is invalid and/or not in compliance with the law.

C (2) Even if the said contract of guarantee had been signed by the first defendant it was done —

(a) under the undue influence and promise of the plaintiff which were mala fide;

(b) without appropriate advice and without compliance with the D legal provisions;

(c) while the first defendant was confused and/or the terms were not explained to the first defendant;

(d) with the assurance of the plaintiff that the plaintiff would not institute any legal proceedings in the event of any financial E problems and the matter would be settled amicably.

On 2 October 2000, the first and second defendants filed their statement of defence (exh 11). The court observes that the contentions of the first defendant in the statement of defence are repeated in its affidavit-in-reply (encl 12).

F The plaintiff, in his affidavit-in-reply, affirmed on 13 June 2000 (encl 32) to the first defendant's affidavit-in-reply (encl 12) averred that all the matters raised by the first defendant were denials and did not constitute any triable issue. He also exhibited proof of posting of the said notice of demand by way of registered post by exhibiting a copy of the registration slip issued by the post office and the photostat copy of the relevant page of the G postage book, collectively, as 'YKH-5'.

In addition to the above matters raised in the first defendant's affidavit-in-reply (encl 12), Cik Ayleswary, the learned counsel for the first defendant, has raised the following three issues in her oral submissions:

H (1) The plaintiff's application (encl 6) is defective because it mentions summary judgment and does not mention specific performance. Although the attached minutes (exh 'YKH-4') mention specific performance this is insufficient because the plaintiff must state in the body of the summons itself the order for specific performance sought by the plaintiff.

I (2) The plaintiff is not entitled to specific performance of the said contract of guarantee because the plaintiff is given an option under cl 2 of the said contract of guarantee to sell, transfer, dispose of and/or deal with

the shares in the event that the first defendant fails to pay the buy back price of the shares to the plaintiff in accordance with cl 1.1 of the said contract of guarantee.

(3) The first defendant is not liable under the said contract of guarantee because there is no proof of receipt of the notice of demand (exh 'YKH-3') by the first defendant.

The law applicable

Order 81 of the RHC applies to an application by a plaintiff in any action begun by writ indorsed with a claim for:

(a) specific performance of an agreement for the sale, purchase, exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or

(b) rescission of such an agreement; or

(c) the forfeiture or return of any deposit made under such an agreement, on the ground that the defendant has no defence to the action.

The court is of the view that although the said contract of guarantee is clearly not an agreement for the grant or assignment of a lease of any property, nevertheless, it is an agreement for the 'purchase ... of any property, with an alternative claim for damages'. This is because pursuant to the terms and conditions of the said contract of guarantee, in particular, cl 8, the first defendant has stepped into the shoes of the said purchaser as principal debtor and having done so the first defendant is contractually bound to purchase the Pacific Matrix shares from the plaintiff at the buy-back price of RM3,658,585.04.

Clause 8 is reproduced below for its full effect:

> Wijaya hereby agrees that as between Wijaya and the Vendor, Wijaya shall be a principal debtor for all the amounts due and owing at any time and/or from time to time by the Purchaser and/or Wijaya to the Vendor and all sums of money which may not be recoverable from Wijaya on the footing of a guarantee whether by reason of any legal limitation, disability or incapacity on or of the Purchaser or any other fact or circumstances including without limitation where the Purchaser, being a limited company, may have exceeded its powers and whether known to the Vendor or not or the want of authority by any person purporting to act on behalf of the Purchaser shall nevertheless be, recoverable on demand from Wijaya as the sole and principal debtor.

In addition, the first defendant is also liable under the said contract of guarantee, in particular, cl 1.1, as a guarantor, to purchase the Pacific Matrix shares from the plaintiff at the contractually agreed price of RM3,658,585.04.

Clause 1.1 of the said contract of guarantee which uses the word 'purchase' fortifies the above issue. The clause is reproduced below for its full effect:

> In consideration of the Vendor agreeing, inter alia, at the request of Wijaya to enter into a supplementary agreement with the Purchaser, to inter alia, grant an extension of time to the Purchaser to complete the purchase of the Properties and to vary the mode of payment on the terms and conditions contained therein (hereinafter referred to as 'the Supplemental Agreement'), Wijaya hereby agrees and undertakes to:
>
> 1.1 forthwith, upon demand by the Vendor and provided the Purchaser is in breach of any of the provisions of the Supplemental Agreement, or on the 30th day of June, 1999, whichever is the earlier, purchase the Shares as defined in cl 2.2.2 of the Supplementary Agreement from the Vendor at the Buyback Price as defined in cl 5.1 of the Supplementary Agreement which shall be paid by Wijaya to the Vendor within fourteen (14) days of such demand and upon receipt by the Vendor of the Buyback Price, the Vendor shall transfer the Shares to Wijaya at the cost and expense of Wijaya; (Emphasis added.)

The words 'sale' and 'purchase' are used in their strict primary meaning, namely, a sale or purchase in consideration of a money payment (see *Robshaw Bros Ltd v Mayer* [1957] Ch 125, [1956] 3 All ER 833 and *Young v Markworth Properties Ltd* [1965] Ch 475, [1965] 1 All ER 834.) In *Mohamed bin Othman & Anor v Abdul Shattar bin Abdul Rahim & Ors* [1987] 2 MLJ 695 the Supreme Court, by a majority, allowed the appellants' appeal on the grounds, inter alia, that there was a valid and enforceable contract for the sale of shares in a private company and that there were no triable issues. Consequently, it made an order of specific performance against the respondents under O 81 of the RHC.

Order 81 r 2(1) of the RHC requires the application to be made by summons supported by an affidavit made by some person who can swear positively to the facts verifying the cause of action and stating that in his belief there is no defence to the action. In the instant case, the plaintiff himself has sworn the supporting affidavit verifying his cause of action and stating in his belief that the first defendant has no defence to his action. Rule 2(2) also requires the summons to set out or have attached thereto minutes of the judgment sought by the plaintiff. In the instant case, this has been done. Rule 2(3) further requires the summons, a copy of the affidavit in support and of any exhibit referred to therein to be served on the defendant within 14 days from the date of issue of the summons. In the instant case, this fact has not been disputed. By virtue of r 2A, the first defendant if it wishes to reply to the plaintiff's supporting affidavit, is required to file his affidavit-in-reply and serve it on the plaintiff within 14 days from the date on which the plaintiff's supporting affidavit was served on him. In the instant case, this was done. The same applies to the plaintiff if he wishes to reply to the defendant's affidavit-in-reply. In the instant case, this was also done.

The next rule which is relevant to the instant case is O 81 r 3. It provides as follows:

> Unless on the hearing of an application under rule 1, either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for

some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action. A

Order 81 r 4(1) is also relevant to the instant case. It provides as follows:

(1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court. B

Issues for determination by court

The court will now consider and determine the following issues:

(1) whether the plaintiff's application has complied with the requirements of O 81 of the RHC; and C

(2) whether the first defendant has satisfied the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action;

First issue: whether plaintiff's application has complied with the requirements of O 81 of the RHC D

In view of the plaintiff's summons in chambers (encl 6), the plaintiff's attached minutes of judgment (exh 'YKH-4'), the plaintiff's supporting affidavit (encl 7), the said supplementary agreement (exh 'YKH-1') and the said contract of guarantee (exh 'YKH-2'), the court is satisfied that the plaintiff has complied fully with the requirements of O 81 rr 1 and 2 of the RHC. The court, further, finds that the plaintiff has succeeded in establishing a prima facie claim for summary judgment for specific performance of the said contract of guarantee. E

Therefore, pursuant to O 81 r 3 of the RHC, the court may give to the plaintiff summary judgment as sought for by the plaintiff in the attached minutes of the judgment unless the defendant can satisfy the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action. F

Second issue: Whether there is any issue or question in dispute to be tried or there ought to be a trial of the action G

In the instant case, the first defendant has chosen to show cause against the application of the plaintiff by filing an affidavit-in-reply and also by raising three issues in the oral submissions of its learned counsel, which have already been set out in the foregoing para 16 and I do not propose to repeat them here. The court will deal with them under three separate questions, after having dealt first with the first defendant's contentions as set out in its affidavit-in-reply. H

Having subjected the first defendant's affidavit-in-reply (encl 12) to a careful consideration, the court is satisfied that the first defendant has failed to show cause against the plaintiff's application. The court is satisfied that the first defendant has failed to show that there is any issue or question in dispute to be tried or that there ought to be a trial of the action. In order to I

A facilitate easy reference the court has divided the first defendant's contentions in its affidavit-in-reply into three parts.

First Part: Bare denials

B The first part which has already been set out in the foregoing paras 12(1) to (8) comprises bare denials. With regard to bare denials, in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363, at p 367, the Court of Appeal held as follows:

> When an application is made for summary judgment under O 14 supported by an affidavit which goes to show that there is no defence, the defendants
C must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. In the present case the guarantors do not appear to have appreciated this. Their affidavits merely relied on the defence they pleaded, which consists of bare denials and
D points of law which they could not sustain.

Although that case concerned an application for summary judgment under O 14 of the RHC, it is equally applicable to an application for summary judgment for specific performance under O 81 of the RHC.

This is clearly borne out in the case of *Ng Ah Ba & Ors v Ramanda Sdn*
E *Bhd* [1996] 1 MLJ 62, relied upon by Mr A Iruthaya Raj, the learned plaintiff's counsel. In that case the respondent brought summary proceedings against the appellants for specific performance of a second sale and purchase agreement to sell a piece of land in Seberang Perai for the sum of RM3,253,966.85 pursuant to O 81 of the RHC. The trial judge held that there was no triable issue and granted summary judgment to the
F respondent. The second, third and fifth appellants appealed on the grounds that the trial judge had failed to consider the evidence of a possible conspiracy between the respondent's manager, the first appellant and the appellants' solicitors, in that the actual purchase price of the land which was RM4.8 m was concealed from them.

G In dismissing the appeal, Shaik Daud JCA (as his Lordship then was) had this to say at p 69 and I quote as follows:

> Now, being an application for summary judgment under O 81, which is a procedure similar to O 14, the defendant need only to show that there is a triable issue or that there ought for some other reasons to be a trial of the
H action. As mentioned earlier, the second, third and fifth defendants' main defence to the plaintiff's application for summary judgment is the allegation of the conspiracy. It goes without saying that if they succeed on this, the learned judge ought to have dismissed the plaintiff's application and grant them leave to defend. In this case, the learned, judge came to the conclusion that the mere allegation of conspiracy was not sufficient for him to order a
I trial, and in fact he came to his finding, based as it were, on the affidavits and contemporary documents that there was no conspiracy as alleged. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, which was relied upon by the learned judge, the Supreme Court held at p 408:

> 'Under an O 14 application, the duty of the judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. ... unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application.'

Second and Third Parts: Bare points of law

The second part which has been set out in the foregoing para 13(1) comprises three sub-parts, namely, that the plaintiff did not have any cause of action and/or the plaintiff's cause of action is invalid and/or not in compliance with the law. The first sub-part has no merits because the first defendant has not applied under O 18 r 19 of the RHC to strike out the plaintiff's statement of claim on the ground that it does not disclose a reasonable cause of action. The second and third sub-parts also have no merits because the first defendant has not given any particulars as to why it has contended that the plaintiff's cause of action is invalid and/or not in compliance with the law. As the matter stands, the court is satisfied that the plaintiff has established a valid and enforceable contract for the buy back of the Pacific Matrix shares by the first defendant from the plaintiff.

The third part comprises four sub-parts which have already been set out in the foregoing paras 13(2)(a) to (d). In my view, since the first defendant has not condescended to give any particulars in respect of the four sub-parts, the court is also of the view that the four sub- parts being bare points of law which the first defendant is unable to sustain, as there are no factual details accompanying them, are clearly insufficient to demonstrate that the first defendant has a good arguable defence or that there is any issue of fact or law or mixed fact and law which requires further investigation at a trial.

Question 1: Whether necessary for prayer for specific performance to be set out in the body of the summons under O 81 of the RHC

Mr A Iruthaya Raj, the plaintiff's learned counsel, has submitted that the plaintiff's failure to specify the prayer for specific performance in his summons-in-chambers is not fatal because it has been so specified in the draft minutes of judgment attached, ie in the first prayer.

Miss Ayleswary, the first defendant's learned counsel, has submitted that the plaintiff's summons-in-chambers (encl 6) merely asked for summary judgment for the sum of RM3,658,555.04 but it did not state that the plaintiff is asking the first defendant to buy back the Pacific Matrix shares. In response to the submissions of Mr A Iruthaya Raj, she has sought to rely on the following meaning of the word 'minute' in *Bouvier's Law Dictionary*:

> In Practice. A memorandum of what takes place in court, made by authority of the court. From these minutes the record is afterwards made up.

A Toullier says they are so called because the writing in which they were originally was small: that the word is derived from the Latin *minuta (scriptura)*, in opposition to copies which were delivered to the parties, and which were always written in a larger hand. 8 Toullier, n 413.

Minutes are not considered as any part of the record; I Ohio 268. See 23 Pick 184. It is not the office of the clerk's minutes to indicate the legal
B questions raised upon a trial and determined by the court; 94 NY 514; 80 Ky 377; 34 La Ann 369.

and the following excerpt from p 696 of the book 'Chancery Practice (by Daniell's)' relating to minutes of a judgment or order pronounced by the court:

C

SECTION III — Drawing up, Passing, and Entering Judgments and Orders.

Ch. XV.s. 3.	When a judgment or order is pronounced by the Court *(a)*, a note of it is taken down by the Registrar in
D	attendance *(b)*. In simple cases he may settle and pass
Minutes of judgments and orders.	the order without notice to either party *(c)*, but as a general rule minutes of the judgment or order are prepared from his note and copies issued to the solicitors of the parties *(d)*.

E to contend otherwise.

In my opinion the meaning of the word 'minute' in *Bouvier's Law Dictionary* relied upon by Miss Ayleswary pertains to the 'record' of the court proceedings, ie what had transpired in court made by the judge or registrar in attendance in the form of handwritten notes whereas the word
F 'minutes' found in O 81 r 2(2) of the RHC refers to the orders or reliefs sought for but not yet granted or made by the court and are drafted and attached to the O 81 summons as required by r 2(2) on the supposition or assumption that the plaintiff's application will meet with the court's approval. The meaning of the word 'minutes of the judgment or order' in the book, *Chancery Practice* by Daniell's which was also relied upon by Miss
G Ayleswary means the minutes of a judgment or order already pronounced by the court.

The rationale for such a requirement in respect of summary proceedings under O 81 of the RHC could well have been to ensure that the final orders can be speedily, promptly and expeditiously issued by the court
H upon the termination of the proceedings in the applicant's favour. The judge is at liberty to grant or refuse to grant all or any one or more of the attached minutes of judgment. There could well be another important rationale for such a practice or requirement, ie to alert the applicant's opponent concerning the orders or reliefs sought for by the former and to overcome any ambiguity or vagueness in the summons so that the defendant
I will be able to respond effectively to the applicant's application and to prepare comprehensively his defence and to submit, accordingly, on the date of hearing.

In *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268, the plaintiff sought for an order for specific performance of an agreement and alternatively a rescission of the said agreement and claimed damages and costs pursuant to O 81 of the RHC. The defendant unsuccessfully tried to have the plaintiff's application dismissed with costs for non-compliance with O 81 r 2(2) of the RHC by raising a preliminary objection. According to the defendant, there was a failure on the plaintiff's part to attach to its application the minutes of the judgment sought. Lim Beng Choon J (as his Lordship then was) held as follows (at p 271):

> Turning to the second issue concerning the irregularity of the application, all I can say is that when the applicant is seeking the aid of Order 81 *there is an option either to set out the reliefs of the judgment sought by the plaintiff in the summons or attached thereto minutes of the judgment sought by the plaintiffs (see Order 81 rule 2 of the Courts of Judicature Act) — and it is not mandatory that an application for Order 81 must in all cases have the minutes of the judgment sought for attached to the summons although in practice minutes of the judgment are normally attached to the summons. In any event the failure to attach the said minutes to the summons is in my view not fatal; it is curable under Order 2 rule 1 of the High Court Rules. I therefore cannot accede to the learned defence counsel's contention that the application made by the plaintiff is bad and therefore must be struck out.* (Emphasis added.)

I am of the respectful view that the above case is equally applicable to the facts of the instant case where the situation is reversed, ie the decree of specific performance is spelt out in the proposed minutes of the judgment attached to an O 81 summons but not stated in the body of the O 81 summons itself. I also find support for my views in the following excerpt from the Malaysian Court Practice — High Court:

> ORDER 81
>
> ...
>
> [81.1.1] Scope of order
>
> This order provides a procedure similar to O 14 and enables a plaintiff, where there is no triable defence to the action, to obtain summary judgment in an action for specific performance of a contract ... for the sale and purchase of [property] without having to proceed to a full trial ...
>
> This order supercedes the old O 14 of the repealed RSC 1957.
>
> There are procedural differences between O 81 and O 14. The major ones are as follows:
>
> (a) ...
>
> (b) the summons under O 81 must set out or have attached thereto minutes of judgment sought (see r 2(2));
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> [81.1.3] Specific performance
>
> ...
>
> To facilitate the order for specific performance, r 2(2) requires the summons to set out or have attached thereto minutes of the judgment which the plaintiff seeks.

> Normally, the first part of the order for specific performance would provide for the agreement to be specifically performed and the second part would encompass other necessary directions for performance which may relate to the terms and conditions of the agreement...

The first question should, therefore, be answered in the negative.

Question 2: Whether plaintiff's application for specific performance must fail because of the availability of an option in cl 2 of the said contract of guarantee

The plaintiff does not dispute that cl 2 of the said contract of guarantee confers on the plaintiff an option either to sell, transfer, dispose of and/or deal with the Pacific Matrix shares in the event that the first defendant defaults in buying back the Pacific Matrix shares from the plaintiff in accordance with cl 1.1 of the said contract of guarantee. In view of the availability of this option, Miss Ayleswary contends that the plaintiff is disentitled from applying for an order of specific performance. She has however, cited no authority to support this proposition of law.

Neither has Mr A Iruthaya Raj referred me to any authority to the contrary. Having conducted some research on my own into the matter I found that the first defendant's contention is without merits because of the following passage in *Halsbury's Laws of England* (4th Ed, Reissue) at p 480:

> (ii) **Sale of Shares**
>
> **Contracts relating to shares.** It is the practice of the court to grant specific performance of contracts for the sale of shares in companies, unless they are freely available in the market. This means that specific performance will usually be ordered of a contract for the sale of shares not quoted on the International Stock Exchange.

The first defendant has not shown that the Pacific Matrix shares are freely available in the market. It has also not shown that the Pacific Matrix shares are quoted on the International Stock Exchange. In *Woodlands v Hind* [1955] 2 All ER 604, [1955] 1 WLR 688 it was held that summary judgment for specific performance of a contract for the sale of shares in a limited company can be given.

The second question should, therefore, be answered in the negative.

Question 3: Whether essential for the plaintiff to show proof of receipt of notice of demand by first defendant

Having considered cl 19 in the said contract of guarantee relied upon by the plaintiff's learned counsel, the court finds that this question also has no merits. Clause 19 deems the said notice of demand which has been addressed to the first defendant at the address specified in the said contract of guarantee to have been received by the first defendant if sent by post at the expiration of 48 hours after it has been posted. This is expressly provided to be so even if it is returned undelivered although the facts here do not show that the said notice of demand was returned undelivered to the plaintiff.

The third question should, therefore, be answered in the negative.

Conclusion

In the premises, the court granted order in terms of the plaintiff's application (encl 6).

Plaintiff's application allowed.

Reported by Lim Lee Na